



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 4, 2003

Ms. Joanne Wright  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2003-6206

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187122.

The Texas Department of Transportation (the "department") received a written request for six specified documents pertaining to a particular railroad crossing. You contend that the records you submitted to this office as being responsive to the request are excepted from required public disclosure pursuant to section 552.111 of the Government Code and section 409 of title 23 of the United States Code.<sup>1</sup>

Initially, we note that some of the submitted information is expressly made public under section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part, this section provides:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup>We note that you have submitted to this office only five of the six requested documents. We assume the department has released the remaining requested document to the requestor. If it has not, it must do so at this time. See Gov't Code §§ 552.301, .302. We also note that in addition to the requested documents, you have submitted other documents, which we have marked, that are not responsive to the request. This ruling does not address the extent to which those additional documents are subject to required public disclosure.

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). Some of the submitted information consists of completed estimates, which are expressly public under section 552.022(a)(5). Therefore, the department may withhold that information only if the information is confidential under other law. Although you argue that the submitted information is excepted under section 552.111 of the Government Code, section 552.111 is a discretionary exception and therefore is not "other law" for purposes of section 552.022.<sup>2</sup> Accordingly, the department may not withhold the completed estimates under section 552.111.

You also contend that this information is confidential under section 409 of title 23 of the United States Code. Section 409 provides as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [sic] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. Federal courts have stated that section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally-required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7<sup>th</sup> Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8<sup>th</sup> Cir. 1992). We agree that section 409 of title 23 of the United States Code is other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*,

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

53 S.W.3d 328 (Tex. 2001); *see also* *Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of section 409, upon which county relied in denying request under state's Public Disclosure Act). Therefore, after reviewing your arguments and the submitted documents, we conclude that the department must withhold the submitted estimates pursuant to section 409 of title 23 of the United States Code.

Next, we address your claim under section 552.111 of the Government Code with respect to the remaining responsive information. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." You contend that the remaining responsive information would be protected from discovery in civil litigation under section 409 and thus is excepted from disclosure under section 552.111 of the Government Code. Based on your representations and our review of the remaining responsive information, we find that this information falls within the scope of section 409 of title 23 of the United States Code. We note that this information includes communications with other governmental and private entities. We agree that section 552.111 encompasses these communications. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). We therefore conclude that the department may withhold the rest of the responsive information under section 552.111 of the Government Code.

In summary, the department must withhold the submitted information that is subject to section 552.022(a)(5) of the Government Code pursuant to section 409 of title 23 of the United States Code. The department may withhold the remaining responsive information pursuant to section 552.111 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/RWP/seg

Ref: ID# 187122

Enc: Submitted documents

c: Mr. Todd A. Robinson  
Patterson & Associates  
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(w/o enclosures)